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LEGAL MISCELLANY.

HINTS TOWARDS A HISTORY OF THE SUPREME COURT.

To the Editors of the Law Register:

GENTLEMEN:—Will you permit me to suggest some hints towards a history of the Supreme Court of Pennsylvania? If the subject were pursued by a competent hand, it could not fail to be a valuable contribution, not only to the literature of the profession of the law, but practically useful in the administration of justice. There is one individual at least among us, who, if he could be prevailed on to undertake it, would do ample justice to such a theme, and who, having long ago retired from the more active duties of his profession, after having secured a most enviable reputation, has leisure to put into form the results of his experience, learning and reflections on this important subject. This brief article is only intended to suggest an outline of such a work, through the hope that such a one as the person referred to, may be induced to fill it up, or propose and fill up a better.

The history of a court of justice, written with care and fidelity, would be as curious and interesting as that of many a State or hero; certainly of greater importance, and of more practical utility to the profession, and community over which it exercises jurisdiction. A good judge is one of the greatest blessings that a people can possess: and he is especially such to the profession from which he himself has sprung, and with whose honor and character his own are intimately connected. The efficiency of the laws of the land in attaining the end of their creation, must always mainly depend on the character of the Bench, and of the individuals of which it is composed. It is not the rights and interests of litigants only, that are dependent on the integrity, judgment and ability of judicial functionaries; but the temporal well-being and happiness of the community: and the cause of justice and morality are also intimately bound up and connected with these. On the other hand, a judge or bench destitute of integrity, of learning, of dignity, of

independence and ability, or liable to be swayed by passion, prejudice or corruption, "fear, favor or affection," is one of the greatest evils to which a community can be exposed, and one of the most mischievous and dangerous instruments of wrong, injustice and oppression, that can inflict any people.

In the history of the Supreme Court of Pennsylvania, deduced from its origin to the present time, are to be found many illustrious examples of the former class, and perhaps as few instances of the latter as falls to the lot of most States and nations.

The history of this Court might be conveniently divided thus:

1st. History of the Court prior to the year 1777.

2d. During the period when Thomas M'Kean presided as Chief Justice, 1777 to 1799.

3d. During the period that Edward Shippen was Chief Justice, 1799 to 1806.

4th. During the Chief Justiceship of William Tilghman, 1806 to 1827.

5th. During the time that John B. Gibson was Chief Justice, 1827 to 1851.

6th. History of the Court since the judges have been elected by the people, 1851 to the present time.

Numerous topics would be involved in the investigation of the history of each of these periods. Among them, a few may be suggested: 1. *The judicial character of each Chief Justice and his associates, as derived from his decisions, &c.* This title would embrace several matters, such as the experience and practice of each judge at the bar, before taking a seat on the bench; his qualifications for the office, in reference to professional acquirements, such as law learning, business talents, temper, soundness of judgment, or the reverse, as exhibited in his decisions and opinions; whether the rule of *stare decisis* was respected by him, or whether he was tempted to yield to the seductive solicitations of the "fiend discretion," as Sir William Jones designates that most fatal enemy of law and jurisprudence: a vice to which every tribunal is naturally prone, and which, if unchecked and unrestrained, takes away all certainty and stability in the administration of justice, and threat-

ens the safety of all the dearest rights of individuals. The rule of *stare decisis* is one of the most effectual antidotes to the poison of this vice, the best counter-charm to the incantations of the fiend.

2. Another topic involved in the history of each of these periods would be, the effects produced on the *laws by the administration of each successive series of judges*: as, whether any of the doctrines and principles of the law had been changed, modified, abrogated or restored; and whether the application of these, and their practical working and operation had been altered, restrained or extended; and whether these changes had become engrafted permanently on the jurisprudence of the State, or their influence had been but partial and transitory. This would lead to the subject of judicial legislation, a topic to be handled with delicacy and discrimination, but candidly and without timidity, or the servile fear of names or of men.

3. Another subject to which the judicial historian would direct his attention, would be *the mode of dispatching and transacting the business of the Court during the several epochs of its history*. This would involve the mode of preparing cases for argument—the rules as to the hearing of counsel—the demeanor of counsel and judges respectively, in their intercourse with each other—the consultations of the judges on the bench and in their private meetings. The ethics of the bench would form an important feature of this department. Judge Sharswood has rendered good service to the bar by his “Professional Ethics.”¹⁴ He would serve both bench and bar by giving his views on “Judicial Ethics,” or Ethics of the Bench. Under this head might also be discussed the subject of the causes which have led to the abridgment of the right of counsel to be heard, and whether the practical working of this rule tends to the better administration of justice.

These are a few of the inquiries to be made by one who would undertake to write a History of the Supreme Court of Pennsylvania. I do not know any literary or professional work calculated to benefit the bench and bar of Pennsylvania more than such a history faithfully executed. Let me invite you to urge the task on one competent to perform it, one whose learning, judgment, abilities

and leisure require him to pay, in this currency, the debt he owes his profession, and the amount of which debt is greater in proportion to the extent of the talents bestowed upon him.

Permit me to subscribe myself your friend, and also

AMICUS CURIAE.

PRESUMPTION OF SURVIVORSHIP.

In a very late English case, 1 Jur. N. S. 169 Ch., *Underwood vs. Wing*, where it appeared that both husband and wife were drowned at sea, having been swept off the side of the vessel by the same wave, there was no direct evidence, one way or the other, as to survivorship, but there was considerable medical evidence of a conflicting nature. Some of the medical witnesses stated that asphyxia would take place at the same time in a case of complete and continued submersion of a man aged forty-three and of a woman aged forty, (the respective ages of the husband and wife), and that there was in this case no medical presumption of survivorship. Others of the medical witnesses stated, that although asphyxia might take place at the same moment of time in both cases, still that asphyxia was not death; and that "the length of time between asphyxia supervening and death ensuing, would depend on the physical strength of the party, varying according to age and sex, and the healthy or unhealthy state of the body; *cæteris paribus*, that time would be longer in the case of a male of forty-three, than of a female aged forty;" and they were of opinion that there was in this case a *medical* presumption in favor of survivorship of the husband.

But held by WIGHTMAN, J.—The question of survivorship is the subject of evidence to be produced before the tribunal which is to decide upon it, and which is to determine it as it determines any other question of fact. If there be satisfactory evidence to show that the one survived the other, the tribunal ought so to decide; and if there be no evidence, the case is the same as in a great variety of other cases, more frequent formerly than at present, where